

## Louisiana Law Review

---

Volume 19 | Number 2

*The Work of the Louisiana Supreme Court for the  
1957-1958 Term  
February 1959*

---

# The Trust Concept and Substitution

Robert A. Pascal

---

### Repository Citation

Robert A. Pascal, *The Trust Concept and Substitution*, 19 La. L. Rev. (1959)  
Available at: <https://digitalcommons.law.lsu.edu/lalrev/vol19/iss2/5>

This Article is brought to you for free and open access by the Law Reviews and Journals at LSU Law Digital Commons. It has been accepted for inclusion in Louisiana Law Review by an authorized editor of LSU Law Digital Commons. For more information, please contact [kreed25@lsu.edu](mailto:kreed25@lsu.edu).

# The Trust Concept and Substitution

Robert A. Pascal\*

In a short essay published almost six years ago the writer invited attention to what he considered some of the more general policy issues and technical problems attending the introduction of the Anglo-American trust into Louisiana.<sup>1</sup> Part of the burden of that essay was to emphasize the importance of viewing the trust in its essential functional or substantive character rather than in terms of its formal structure if its integration into Louisiana's civil law and practice were to be accomplished with minimum difficulty. The truth of this proposition should hardly require demonstration. The formal structure of the trust, the separation of legal title and beneficial interest,<sup>2</sup> is meaningful and technically useful only within the framework of the dualism of law and equity, a formal structure found in its parent legal system but not in the Louisiana civil law. Its essential functional or substantive character, on the other hand, the separation of control and interest, can be understood within the framework of any legal system. By redefining the trust in these terms for working purposes, therefore, much greater clarity can be attained in the interpretation and application of trusts in relation to the totality of Louisiana law. The burden of this article will be to demonstrate how such a redefinition of the trust can be of utility in determining whether or not a trust violates the prohibition against substitutions and *fidei commissa*.<sup>3</sup>

---

\*Professor of Law, Louisiana State University.

1. *Some ABC's about Trusts and Us*, 13 LOUISIANA LAW REVIEW 555 (1953).

2. This is the formal structure adopted in the Louisiana Trust Estates Law. LA. R.S. 9:1811 (1950) reads: "A trust shall be created when a person in compliance with the provisions of this Chapter transfers the legal title to property to a trustee in trust for the benefit of himself or a third person."

3. The prohibition is contained principally in the Civil Code and the Constitution of Louisiana, and secondarily in the Louisiana Trust Estates Law itself. The pertinent provisions are as follows:

LA. CIVIL CODE art. 1520 (1870), in part: "Substitutions and *fidei commissa* are and remain prohibited.

"Every disposition by which the donee, the heir, or legatee is charged to preserve for or to return a thing to a third person is null, even with regard to the donee, the instituted heir or the legatee. . . ."

LA. CONST. art. IV, § 16, as amended: ". . . No law shall be passed authorizing the creation of substitutions, *fidei commissas* (sic) or trust estates; except that the legislature may authorize the creation of trust estates for a period not exceeding ten years from the settlor's death as to a beneficiary which is not a natural person; ten years from the settlor's (sic) death as to a beneficiary who is a natural person or until the death of the beneficiary whichever is the

## I.

That the trust of today is essentially but a separation of control and interest over and in property is evident from the fact that the trustee is never deemed to have a personal interest. The only person who has a beneficial interest in the property itself is the beneficiary. The trustee administers and manages the property for and in the interest of the beneficiary. In essence, therefore, the trustee's "legal title" is similar to a tutor's authority to control the property of a minor. Of course, there are differences between trust and tutorship, but these do not alter the essential similarity of the two institutions. Whereas the trustee's powers and authority in controlling the property in the interest of the beneficiary can be, and most often are, determined by the will of the settlor, those of the tutor are set by a legally defined pattern seldom variable by the person transferring property to the minor. But, it may be observed, trusts would not cease to be trusts if settlors were forbidden to alter a legally defined scheme of trustees' powers and authority, and tutorship would not cease to be tutorship if the donor of property to a minor were permitted to state the terms of administration by the tutor.

The last four years have given witness to a phenomenon which illustrates the point just made. An entirely new legal institution, unfamiliar to Anglo-American and to Louisiana law, has been introduced into both by statute. *The Uniform Gift to Minors Act*<sup>4</sup> and a similar model *Act Concerning Gifts of Securities to Minors*,<sup>5</sup> one or the other adopted in most of the American states,<sup>6</sup> make it possible for property (securities or

---

longer period; and provided further that this prohibition as to trust estates or fidei commissas (sic) shall not apply to donations strictly for educational, charitable, religious purposes or trusts created by employers for the benefit of their employees." LA. R.S. 9:1791 (1950), as amended: "The creation of trust estates, as hereinafter set out, shall be lawful, and all trust estates so created shall be subject to the full force and effect of this Chapter. Nothing in Parts I through XII or in Part XIV of this Chapter shall be construed as applicable to or affecting trusts created under Act 107 of 1920 and in existence on July 27, 1938. Nothing in this Chapter shall be construed as applicable to or affecting donations in trust, or otherwise, for educational, charitable, or religious purposes or as abolishing forced heirship; or as authorizing the creation of substitutions, fidei commissas, or trust estates except to the limited extent expressly provided for herein."

4. This act was approved by the National Conference of Commissioners on Uniform State Laws in 1956. It is reproduced in 9B UNIFORM LAWS ANNOTATED 179-194 (1957).

5. This act was prepared by the New York Stock Exchange and the Association of Stock Exchange Firms. Its text is reproduced in the Commerce Clearing House STOCK TRANSFER GUIDE 5201, 5205.

6. The 1958 pocket supplement to 9B UNIFORM LAWS ANNOTATED 16, lists

money under the first, securities only under the second) to be given to a minor but placed entirely under the control of a "custodian." Unlike in trust, but as in tutorship or guardianship, the custodian does not have legal title but does have control. Unlike in trust, but as in tutorship, the terms of the "custodianship" are fixed by law and are unalterable by the donor. As in trust, but unlike in tutorship, it is a private person, the donor, who determines whether the property given shall be subject to this special regime of control. Anglo-American legal minds probably will tend to think of the new custodianship as a trust in substance if not in form;<sup>7</sup> Louisiana civilians will recognize that the institution could have been given the form of a trust (by giving the "custodian" legal title) with special non-alterable terms specified by law; both could understand it as a special tutorship or guardianship, limited to donated securities or money, and which can be imposed only by the donor. Why this new institution was created is, of course, another matter, one largely connected with taxation, the avoidance of the traditional judicial control over the acts of the trustee, and the insulation of third parties against the trustee's unauthorized acts.<sup>8</sup> But the reason for the creation of this new institution lies outside the interests of this article; all that is important here is the fact that its creation serves to illustrate that the separation of control and interest is the essence of trust and of institutions like tutorship and that their other characteristics are secondary and accidental.<sup>9</sup>

There is no reason, therefore, why a trust could not be defined as an institution in which property given to one (the beneficiary or owner) may be placed under the control of a second (the trustee) in the interest of the first (the beneficiary or owner) at the instance of the settlor and in accordance with terms specified by him. This could have been done in Louisiana or any Anglo-American state in the same way in which the

---

thirty states in which the Uniform Act, with minor variations, has been enacted into law. In 1955 and 1956 twelve states and the District of Columbia adopted the Model Act, and in 1957 Alaska adopted a similar statute. Some of these jurisdictions, however, have now repealed the Model Act and enacted the Uniform Act. The Louisiana statute, Act 195 of 1958 (R.S. 9:735-742) seems to combine features of both.

7. For the motivations for the Model and Uniform Acts on gifts to minors see 9B UNIFORM LAWS ANNOTATED 175-178 (1957) and Forbes, *Gifts to Minors*, 19 MONT. L. REV. 106 (1958).

8. See, for example, the article by Forbes, cited in note 7, *supra*.

9. A more thorough discussion of the essential and accidental features of the trust will be found in the article cited in note 1 *supra*.

"custodianship" of a gift to minors was created under the Uniform and Model Acts mentioned before. Of course, just as the decision to avoid the traditional trust formulation in the Uniform and Model Acts must have been based on considerations other than the mere possibility of a new institutional form, so the decision to redefine the trust as a matter of law would depend on considerations other than the possibility. For an Anglo-American jurisdiction the reasons for abandoning generally a formula consistent with its whole legal tradition would have to be impelling indeed, and for Louisiana to do so the disadvantages attending the traditional trust formula would have to be balanced against such things as the loss of facility in using the existing trust literature and the loss of uniformity in trust law statement which would result from the employment of new concepts and a new vocabulary. But, again, there is no need to delve into the merits or demerits of this question in this paper; the important thing is that in working with the trust its technical formulation can be ignored and a formulation in terms of its function and substance employed.

For the rest of this paper, therefore, the trust shall be discussed in terms of its functional or substantive character: an institution or device according to which property transferred to one (the beneficiary or owner) may be placed under the control of a second (the trustee) in the interest of the beneficiary or owner but at the instance of and in accordance with terms specified by the settlor. Before discussing the relation of trusts and substitutions and *fidei commissa*, however, it will be necessary to consider the nature of these two institutions.

## II.

The prohibitions against substitutions and *fidei commissa* carried in Article 1520<sup>10</sup> of the Louisiana Civil Code first appeared in the Civil Code of 1808. This Code, as is well known, was conceived as and entitled a "Digest of the Civil Laws in Force in the Territory of Orleans" and was interpreted as such.<sup>11</sup> These "civil laws" included the Spanish laws applicable in the former colony, of which the *Siete Partidas*<sup>12</sup> must have been

---

10. Quoted in note 3 *supra*.

11. See *Cottin v. Cottin*, 5 Mart. (O.S.) 93 (La. 1817).

12. *Código de las Siete Partidas*, completed in 1265 under Alfonso IX of Castile, and promulgated in 1348. The references hereafter are to the translation by Scott, New York, 1931, which is the only complete translation into English.

considered a major authoritative source, for the legislature in 1819 approved a translation of those portions of it in force in Louisiana.<sup>13</sup> In addition, it is sufficiently certain that the works of Domat<sup>14</sup> and Pothier<sup>15</sup> were relied upon as persuasive if not authoritative guides to the civil law in force.<sup>16</sup> It should be reasonable, therefore, to rely on these three works for indications of what the drafters of the Civil Code's prohibition against substitutions and *fidei commissa* understood these institutions to be.

An examination of these sources reveals a number of institutions which were known as substitutions. One of these, the vulgar substitution, is simply the designation of a second person as donee or legatee should the first named be incapable of accepting or fail to accept.<sup>17</sup> Article 1521 of the Civil Code<sup>18</sup> expressly exempts this vulgar substitution from the general prohibition against substitutions contained in Article 1520 and it has never been contended that it is included within the general prohibition against substitutions contained in Article IV, Section 16 of the Louisiana Constitution of 1921. It need not be considered further. The other substitutions known to pre-codification Louisiana civil law fall into two general categories, the one containing the pupillary and exemplary substitutions, and the other the *fidei commissa*, often call fideicommissary sub-

13. The translation was approved under Act of March 3, 1819, p. 44, and appeared as "The Laws of Las Siete Partidas Which Are Still in Force in the State of Louisiana, translated from the Spanish by L. Moreau Lislet and Henry Carleton." New Orleans 1820. Partida VI, Title V, on substitutions, was left out of this translation on the ground the laws on this subject were no longer in force, having been repealed by the Louisiana "Civil Code" or Digest of 1808, page 216, Art. 40.

14. DOMAT, LES LOIS CIVILES DANS LEUR ORDRE NATUREL (Paris, 1694). The page references hereafter are to the translation by William Strahan, second edition by Cushing, Boston, 1850.

15. POTHIER, TRAITÉ DES SUBSTITUTIONS, published after his death in 1772. The page references hereafter are to the treatise as found in 8 BUGNET, OEUVRES DE POTHIER (Paris 2d ed. 1861).

16. In a manuscript attributed to L. Moreau Lislet, it is mentioned that it is sufficient to cite Domat to indicate the civil law (i.e., Roman law) sources of the laws contained in the Louisiana Digest or Civil Code of 1808. This manuscript also cites the *Partidas*, among other Spanish laws, as a source of the law in force in Louisiana, calling it "the most complete and most perfect code of Spanish law." See Dainow, *Moreau Lislet's Notes on Sources of Louisiana Civil Code of 1808*, 19 LOUISIANA LAW REVIEW 43, at 45 and 47 (1958); and Franklin, *An Important Document in the History of American Roman and Civil Law: The de la Vergne Manuscript*, 33 TULANE L. REV. 35, at 39 and 41 (1958).

17. LAS SIETE PARTIDAS 6.5.1; DOMAT, 2.5.pr. art. and 1 (pp. 617-622); POTHIER, SUBSTITUTIONS, Art. préliminaire (p. 455).

18. LA. CIVIL CODE art. 1521 (1870): "The deposition [disposition], by which a third person is called to take the gift, the inheritance or the legacy, in case the donee, the heir or the legatee does not take it, shall not be considered a substitution and shall be valid."

stitutions, gradual substitutions, direct substitutions, or, simply, substitutions.<sup>19</sup>

The pupillary and exemplary substitutions were simply devices whereby the donor or testator was permitted to designate the person to receive the property given to a minor or to an insane person if he died before reaching the age for testation or while yet insane. In legal theory there was in either case a true direct substitution, the donor's or testator's will operating directly to designate a second or more remote successive donee or legatee of the property.<sup>20</sup> Certainly these substitutions were forbidden by the general prohibition in Article 1520 of the Civil Code and under Article IV, Section 16 of the Louisiana Constitution they may not be authorized by the legislature. It may be noted, therefore, that dispositions known in the Anglo-American law as executory devices, whether in trusts or not, and conditioned on facts similar to those in which pupillary and exemplary substitutions would have been effective, are most certainly forbidden in Louisiana law.

The *fidei commissum*, though in effect a direct substitution and sometimes referred to as such in pre-codification civil law, was distinguished from the true direct substitutions (such as the pupillary and exemplary substitutions) by its origin and technical form. Except in the case of pupillary, exemplary substitutions and others permitted to soldiers, Roman law did not recognize the possibility of a donor's will being effective to transfer property from the first donee or legatee to a successor. This was accomplished at first outside the law. The donor or testator imposed a charge on the donee or legatee to transfer the property, on his death or at some stated time or condition, to another person designated mediately or immediately by the donor or testator. The charge was not legally binding at first, but came to be enforced by the praetor. Thus the original *fidei commissum* resembled the early equitable use of the Anglo-American legal system. It was made fully obligatory by Justinian, however, and from that time on there was no difference in effect between a direct substitution and a *fidei commissum*;<sup>21</sup> and although the *fidei commissum* retained its classical formulation in

---

19. DOMAT, 2.5. pr. art. (p. 619); *Id.* 2.5.3. pr. art. (p. 643).

20. LAS SIETE PARTIDAS 6.5.5-11; DOMAT 2.5.2. (pp. 626-635).

21. On the essentials concerning the *fidei commissum* in Roman law see any text book of Roman law (e.g., BUCKLAND, A TEXTBOOK OF ROMAN LAW 353-360 (2 ed. 1932)). See also the account in DOMAT, 2.5. pr. art. (p. 618).

legal theory, in pre-codification Spanish and French law any words identifying a successor to the donee or legatee, whether direct, fideicommissary, or even of prayer, appear to have been treated as creative of a *fidei commissum*, or substitution.<sup>22</sup>

A reading of the *Partidas*, Domat, and Pothier reveal that a variety of dispositions were treated as *fidei commissa* or substitutions. All, however, possessed one thing in common: the donor or testator mediately or immediately designated the person (the substituted donee or legatee) to receive the property given to the first (instituted) donee or legatee at his death, at the end of a stated period, on the occurrence of an event, or on the fulfillment of a condition; and before the occurrence or fulfillment of the event or condition the instituted donee or legatee was to enjoy in his own right all aspects of property ownership not inconsistent with his obligation to transmit it eventually to the substituted donee or legatee. Thus every *fidei commissum* or substitution gave beneficial ownership to the instituted donee or legatee, but control over its eventual disposition to a third person was in at least some respect subject to the will of the donor or testator and denied to the donee or legatee. A donor or testator could provide, for example, that on *I*'s (the instituted donee's) death, on *S*'s (the named substituted donee's) marriage, or twenty years after *I* received it, *S*, or the heirs or legatees of *S*, or the appointee of *X*, whether born or unborn, should succeed in interest to the property. More simply, the donor or testator could forbid the alienation of the property by act inter vivos or mortis causa, in effect nominating the instituted donee's legal heirs as substituted donees. Or the donor or testator could restrict disposition of the property to certain branches of the donor's or instituted donee's family and the like.<sup>23</sup> Even if the donor expressly permitted the instituted donee to alienate inter vivos or mortis causa, and designated the substitute donee only for the event in which the property remained undisposed of at the instituted donee's death, the situation was considered a substitution because the property would then be received by someone other than the heir of the instituted donee and by reason of his designation by the donor or testator.<sup>24</sup>

22. LAS SIETE PARTIDAS 6.5.14; DOMAT 2.5.3.2.3-9 (pp. 658-60); POTHIER, SUBSTITUTIONS, 2 and 3 (pp. 467-488). The last contains a very comprehensive catalog of the various expressions which might indicate an intention to create a substitution.

23. All the examples of words indicative of substitutions are to be found in POTHIER, SUBSTITUTIONS, 2 and 3 (pp. 467-488).

24. POTHIER, SUBSTITUTIONS, 4.2. pr. (p. 494); *Id.* 4.2.3. (p. 502).



From the above it would appear that no distinction was made between the substitution expressed in direct or fideicommissary or precatory terms in the law in effect in Louisiana before codification, and that Article 1520 must have been intended to forbid them all in the same way. Louisiana jurisprudence, as it is well known, has sought to distinguish between the (direct) substitution and the *fidei commissum* attributing different consequences to each,<sup>25</sup> and French jurisprudence and doctrine have developed their own interpretation of the corresponding article of the French Civil Code.<sup>26</sup> Although this is of considerable interest, it has no effect on the problem of this paper, the integration of trust law and the law of substitutions, and it will not be considered here. From the examination of the *Partidas*, Domat, and Pothier, however, it has been possible to define the substitution and the *fidei commissum* as institutions in which the donor controls, at least in some eventuality if not in every, the designation of the person who is to receive the property from the donee, but in which the donee enjoys in his own right all incidents of ownership not inconsistent with that eventual disposition.<sup>27</sup> And having already redefined the trust in terms of its essential function or substantive character, it is now possible to ascertain whether or when the trust concept or its applications violate the prohibition against substitutions and *fidei commissa*.

### III.

Considering the nature of substitutions and *fidei commissa* as just described, the feature which must have made them objectionable and prompted their prohibition in Article 1520 must have been the donor's direct or indirect exercise of the right of disposition or control of succession which normally would belong to the donee as owner. Of course this is putting the matter in technical rather than in economic and social terms, but the technical aspects of Article 1520 are more important for this paper than the social and economic motivations for its adoption.

In what way, then, did the trust qua trust violate the prohibition against substitutions and *fidei commissa*? Certainly not

---

25. The most recent collection and summary of the principal decisions appear in Jackson and Jeter, *The Guillory Case: What Are Its Implications for Private and Charitable Trusts?*, 32 TULANE L. REV. 415, 418-421 (1958).

26. FRENCH CIVIL CODE art. 896. A general review of the French doctrine and jurisprudence on this article may be found in O'Neal, *The Universality of a Curse: "Future Interests" in the French Law*, 3 LOUISIANA LAW REVIEW 795 (1941).

27. See especially POTHIER, SUBSTITUTIONS, 5.1-3 (pp. 505-516) for a summary of the essential characteristics of a substitution.

in its essential functional or substantive aspect, for this is simply a separation of control and interest, and the beneficiary is not obliged to transfer or to tolerate the transfer of his beneficial interest in accordance with the will of the settlor. The beneficiary is the owner; the trustee manages the property, perhaps even converting it to other assets; moreover the trustee's management is always in the interest of the beneficiary, who retains the right to the property or its conversions, which right he may dispose of as he sees fit, *inter vivos* or *mortis causa*. Of course it is true that the trustee possesses power of control under terms dictated by the settlor, and this, before the legislative authorization of trusts, definitely violated the principle which the whole of Louisiana civil law since 1808, rather than any particular provision of it, reflects so clearly: management belongs to the owner alone or his appointed agent except in certain well defined cases such as incapacity resulting from minority, insanity, or insolvency. But the fact remains that before their statutory authorization, trusts usually were adjudged invalid as violations of the prohibition against substitutions and *fidei commissa*.<sup>28</sup>

Perhaps the principle that management belongs to the owner was nowhere stated with sufficient concreteness to serve as the basis of decision, but there could have been other understandable reasons for the resort to the prohibition against substitutions. The control of the trustee, though in the interest of the beneficiary and not in the interest of a third party designated by the donor or settlor, must have appeared to our judges as sufficiently close to the substitution or *fidei commissum*. This would have been an objection of substance rather than of form. Then, too, there could have been an objection of form. Inasmuch as Louisiana civil law does not admit of the dualism of law and equity, or its child the separation of legal title and beneficial interest, the legal tools for the acceptance of the trust would have been missing; and to regard the trustee's legal title as ownership under Louisiana law would have been to place him in a position very like to that of the instituted donee in a substitution, an owner charged to act in the interest of another designated by the donor or settlor.

Whether or not the trust *qua* trust, with its separation of control and interest, or its accidental feature permitting the

28. See especially Nabors, *Restrictions on the Owning of Property in Louisiana*, 4 TULANE L. REV. 190 (1940).

settlor to determine the terms of control of the beneficiary's interest, violated either the prohibition against substitutions and *fidei commissa* or other aspects of Louisiana law, the fact is that these objections have disappeared with the authorization of trust estates. On the plane of technical formulation, the dualism of legal title and beneficial interest has been introduced at least for trust purposes; and the terms of the management of one's property can be dictated by the donor or other transferor employing the trust device. After all, though the Constitution of the State itself now prohibits substitutions and *fidei commissa*, the same article and section authorizes trust estates, and it can hardly be contended that this authorization does not include both the dualism of legal title and beneficial interest and the permissibility of the determination of the terms of control by the settlor. The conclusion must be that trusts cannot any longer be considered unlawful on the ground the device itself violates the prohibition against substitutions and *fidei commissa*. The problem reduces itself to this, therefore, the determination of the manner in which particular provisions in a trust can violate the prohibition.

#### IV.

By now the answer to the question just put must be obvious: a trust contains a prohibited substitution or *fidei commissum* only if the settlor's will directly or indirectly operates to control the transfer of the interest of the beneficiary to another; if the beneficial interest is completely under the control of the beneficiary there is no substitution or *fidei commissum*. Wherever a substitution or *fidei commissum* would exist as to the interest of the beneficiary if there were not a trust, it exists even if there is a trust.

If this be true, as the writer believes, then extreme doubt is cast on the constitutional validity of spendthrift trusts, or terms imposed by the settlor prohibiting the beneficiary from alienating his beneficial interest in the trust by voluntary act.<sup>29</sup> For the same reason, a discretionary trust, in which the trustee is authorized by the settlor to determine the extent of the interest of the beneficiary in the income or principal or both,<sup>30</sup> would seem to involve a prohibited substitution or *fidei commissum*. On the other hand a direction to accumulate trust revenues would

---

29. LA. R.S. 9:1923 (1950).

30. LA. R.S. 9:1923(c) (1950).

not forbid the beneficiary to alienate his interest therein and should be valid.

Of course all the well known substitutionary and fideicommissary devices would render the affected disposition void if included in a trust. The beneficiaries may not own an interest jointly with right of survivorship. A trust in favor of the survivor or survivors of a class as of a date following that of the creation of the trust would be void. And, of course, one person cannot be substituted to another as beneficiary to the full beneficial interest in the trust property or to the interest in its principal or naked ownership;<sup>31</sup> but there would seem to be no objection under Louisiana law to successive beneficiaries to the income or usufruct, as long as all beneficiaries are in existence on the date of the creation of the trust, for under Article 609 of the Civil Code successive usufructs are permissible.<sup>32</sup> Whether or not making the right of the beneficiary entitled to the principal, or to the principal and income, subject to a suspensive or resolutive condition or to a term would amount to a substitution is to be answered by determining whether the same kind of disposition made directly and not in trust would involve a substitution. Certainly donations *inter vivos* and *mortis causa* subject to conditions and terms are lawful;<sup>33</sup> but, in the writer's opinion, dispositions subject to conditions or terms calculated to control the disposition of the property from the donee to another should be treated as substitutions. This would be the effect, for example, of a donation to *A* if he live to be a certain age, otherwise to *B*.

Two kinds of trust dispositions common in Anglo-American jurisdictions may warrant special consideration. Suppose, first, that *S* transfers property to *T* in trust to pay the income therefrom to *A* during his life and to pay the principal to *B* at the termination of the trust. It would be a mistake to treat this disposition as involving two successive donations of the property to different persons, (1) a donation of the whole property to *A*

31. This subject has been developed more fully in the article cited in note 1 *supra*.

32. LA. CIVIL CODE art. 609 (1870): "If the usufructuary is charged to restore the usufruct to another person, his right to the usufruct expires whenever the time for making such restitution arrives." The Trusts Estates Law itself authorizes the separation of the interests to the income and principal of the trust property (LA. R.S. 9:1811 (1950)) and, inasmuch as this separation cannot outlast the trust itself, it should not be any more objectionable than the dismemberment of ownership into usufruct and naked ownership.

33. LA. CIVIL CODE arts. 1527, 1698, 1699, 2005, 2006, 2030 (1870).

subject to a trust and (2) a second donation to *B* through the trustee. Donations of the whole of the property to take effect successively would amount to a substitution, of course, but only a beneficial interest in the income from the trust principal has been given to *A*, and there has been only one disposition of the beneficial interest in the principal, and this to *B*. Though *B*, the principal beneficiary, is not to receive his interest until the termination of the trust, this is not objectionable, for a donation or legacy can be made in such a manner that its execution is to take place in the future. In the meantime the donee or legatee, under Louisiana law, is regarded as having a transmissible or vested right.<sup>34</sup>

The second kind of disposition often found in Anglo-American states which may warrant special consideration is that in which *S* transfers property to *T* in trust to pay the income therefrom to *A* during his life and, instead of making *B* the principal beneficiary, makes a donation of the same property to *B* as of the termination of the trust. Though there may be the appearance of a double disposition or substitution here, such need not be the construction. As in the preceding case, *A*'s beneficial interest is limited to the income from the trust property and does not include the principal. Nor does the trustee have it. Indeed, if we look at the trust in terms of its substantive character rather than its technical form, the trustee's legal title to the whole of the trust property is only a device facilitating his administration and control of the property. At the end of the trust he must transfer legal title to *S* or his representatives, for under the trust instrument the beneficial interest in the principal was not given to anyone. *B*'s right is that of a donee or legatee to a donation whose execution in his favor is to take place as of a date in the future, here the death of *A* and the termination of the trust in *A*'s favor. At that time *B*, as the only person to whom the beneficial interest in the principal was ever given, may demand of *S* or his representatives the execution of the donation in his favor.

It may be noted too that inasmuch as a donation to be executed in the future is valid under Louisiana law,<sup>35</sup> there should be no reason why such a disposition might not itself be made subject to its own separate and distinct trust. Thus if *S* may

---

34. LA. CIVIL CODE arts. 1527, 1699 (1870).

35. *Ibid.*

transfer property to *T* in trust to pay the income to *A* during his life and to pay the principal to *B* at the termination of the trust, it would seem that he might, instead of directing *T* to pay the principal outright to *B*, direct him to pay it to *TT* in trust for *B*. Of course, under the Louisiana Trust Estates Law *B* must be living at the time of the creation of the trust and the trust would have to come to an end with *B*'s life or ten years from the death of the settlor.<sup>36</sup> In the same way, if *S* may transfer property to *T* in trust to pay the income therefrom to *A* during his life and in the same act make a donation of the same property to *B* as of the termination of the trust in favor of *A*, then it would seem that he might also provide that at the termination of the trust in favor of *A* *TT* is to take the property in trust for *B*. This would be no more than providing for a trust to take effect as of a future date. In either case, the second trust is on an interest in property not given to a preceding donor, and without this there is no substitution. And because the first trust would be completely separate from the second, each being on a separate beneficial interest and under a different trustee, it would seem that one could be private and the other charitable, even if it were deemed unlawful to combine private and charitable donations in the same trust.<sup>37</sup>

#### V.

The foregoing has been intended as a demonstration of the fact that the Anglo-American type trust can be integrated harmoniously with Louisiana's civil law if its technical Anglo-American formulation is ignored and its substantive character alone considered. The area of demonstration chosen was that which has caused most difficulty, that of the prohibition against substitutions, but the same technique could be used in integrating the trust form with any other portion of Louisiana civil law. Moreover, if the technique advocated is sound for this purpose, it is equally sound for handling conflict of laws problems involving the integration of the trust and civilian legal formulations.

It may be explained too that the failure to discuss Louisiana's jurisprudence on problems of the integration of trusts and the

36. LA. R.S. 9:1794 and 1902 (1950), as amended.

37. The question of the validity of a mixed trust was raised but not decided in the Succession of Maguire, 228 La. 1096, 85 So.2d 4 (1956). No opinion on this point is expressed here, it not being relevant to the subject of this article.

law prohibiting substitutions was intentional. The discussion of these decisions not only would have had the effect of distracting the reader, to say nothing of making the paper quite long, but would seem unnecessary. If the reader agrees with the analyses made in this paper, he will have no trouble in determining the correctness or incorrectness of past decisions.